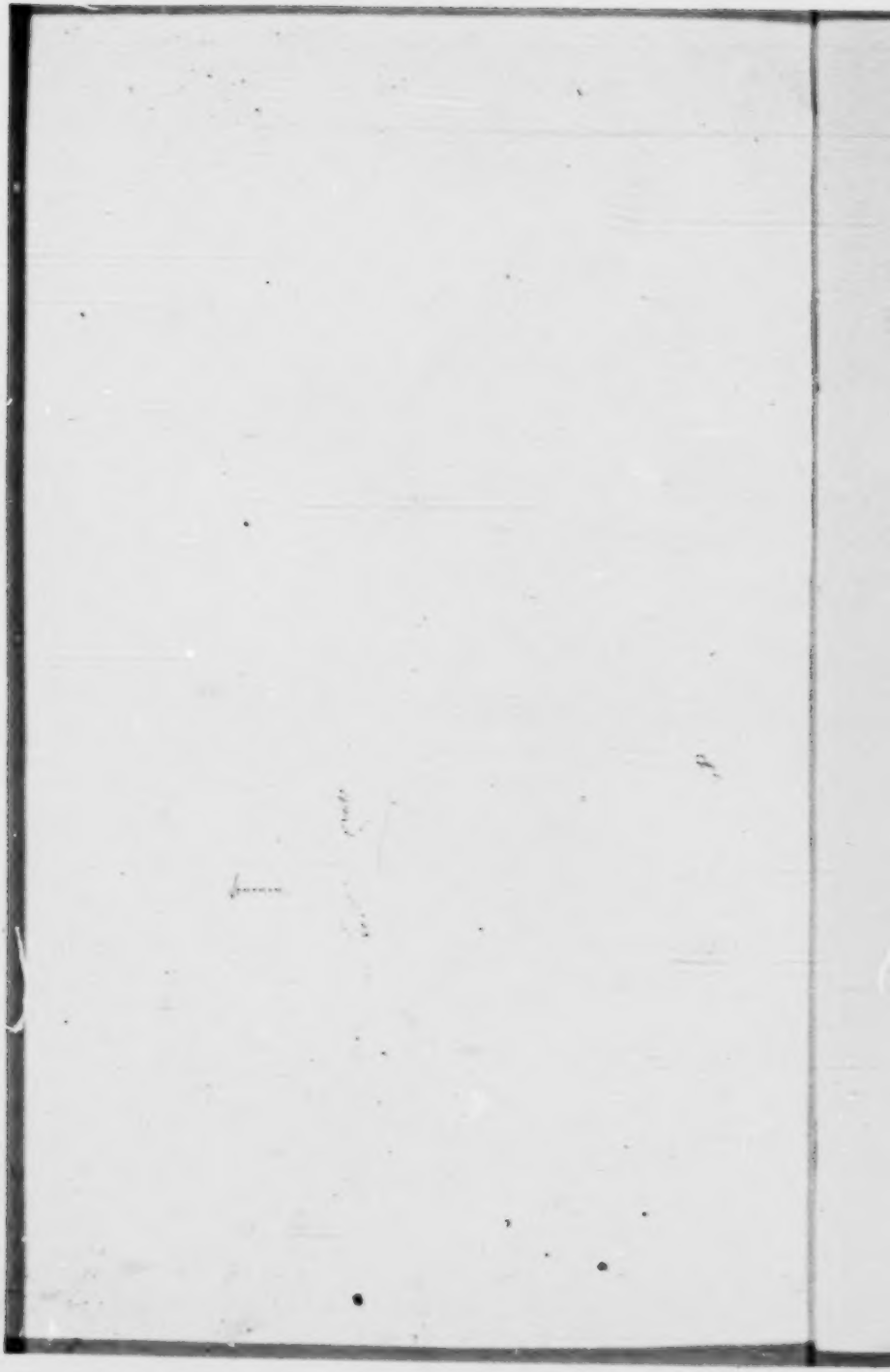

SUPREME COURT, U. S.

DEC 3 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-546.

THE HONORABLE J. WILLIAM DITTER, JR.,
Petitioner,

v.

PHILADELPHIA NEWSPAPERS, INC. and SUSAN Q. STRANAHAN, UNITED STATES OF AMERICA, FREDERICK SCHIAVO,
Respondents.

BRIEF OF RESPONDENTS PHILADELPHIA NEWSPAPERS, INC. AND SUSAN Q. STRANAHAN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX TO BRIEF.

	Page
JURISDICTION	1
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	2
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	6
I. This Court Lacks Jurisdiction to Entertain the Instant Petition	6
II. It Is Inappropriate for This Court to Consider a Petition Filed by a Federal District Court Judge	7
III. The Decision Below Did Not Reach the Important Questions of Federal Law on the Merits of the Silence Order. It Merely Required the Trial Court to Adhere to the Accepted and Usual Course of Judicial Proceedings	8
IV. The Procedural Guidelines Properly Established by the Court Below in the Exercise of Its Supervisory Powers Are in Any Event Mandated by the First Amendment to the Constitution of the United States	10
CONCLUSION	11

TABLE OF CASES CITED.

	Page
Bartone v. United States, 375 U. S. 52, 84 S. Ct. 21, 11 L. Ed. 2d 11 (1963)	9
Carroll v. President and Commissioners of Princess Anne, 393 U. S. 175 (1968)	11
Ex parte Fahey, 332 U. S. 258, 67 S. Ct. 1558, 91 L. Ed. 2041 (1947)	7,8
Freedman v. Maryland, 380 U. S. 51 (1965)	10
Government of Virgin Islands v. Bodle, 427 F. 2d 532 (3d Cir. 1970)	9
Grove Press, Inc. v. City of Phila., 418 F. 2d 82 (3d Cir 1969)	10
Kingsley Books, Inc. v. Brown, 254 U. S. 436 (1957)	10
McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1942)	9
Near v. Minnesota, 283 U. S. 697 (1931)	10
New York Times Co. v. United States, 403 U. S. 713 (1971)	10
Rapp v. Van Dusen, 350 F. 2d 806 (3d Cir. 1965)	6,7,8
Roth v. United States, 354 U. S. 476 (1957)	10
The Miami Herald Publishing Co. v. Tornillo, — U. S. —, 94 S. Ct. —, 41 L. Ed. 2d 730 (1974)	10
Thornhill v. Alabama, 310 U. S. 88 (1940)	10
UAW, Local 283 v. Scofield, 382 U. S. 205, 86 S. Ct. 373, 15 L. Ed. 2d 272 (1965)	6
United States v. Barber, 442 F. 2d 517 (3d Cir. 1971)	9
United States v. Columbia Broadcasting System, 497 F. 2d 102 (5th Cir. 1974)	8
United States v. Columbia Broadcasting System, 497 F. 2d 107 (5th Cir. 1974)	9
United States v. Fioravanti, 412 F. 2d 407 (3d Cir. 1969)	9

MISCELLANEOUS.

	Page
Federal Rules of Civil Procedure 65(d)	9
Federal Rules of Civil Procedure 79(a)	9
Federal Rules of Criminal Procedure 55	9
Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. 518, 519 (1970)	11
28 U. S. C. § 1254(1)	1, 6

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Respondents Philadelphia Newspapers, Inc. and Susan Q. Stranahan respectfully urge that, because petitioner was not a party in the proceedings below, this Court lacks jurisdiction over the Petition for a Writ of Certiorari to review the judgment on rehearing and *en banc* Opinion of the United States Court of Appeals for the Third Circuit, entered on August 8, 1974, and as amended. In the alternative, said respondents pray that the petition be denied.

JURISDICTION.

This Court has no jurisdiction to entertain the instant Petition, as the petitioner, the Honorable J. William Ditter, Jr., was not a party to the action below, as required by 28 U. S. C. § 1254(1).

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED.

1. Can this Court properly consider a petition for certiorari filed by the trial court judge who was not a party in the underlying criminal case nor in the appeal below?

2. Did not the Court of Appeals properly—as a matter of constitutional law and in the exercise of its supervisory power—require: (a) that an order forbidding the press from publishing public record information concerning a criminal defendant, be issued, if at all, only after notice and prompt hearing; (b) that such an Order be reduced to a writing stating specifically the terms of the restraint and the reasons therefor; and (c) that such an Order be entered on the district court docket?

COUNTERSTATEMENT OF THE CASE.

Respondents respectfully submit that the following facts additional to those set forth in the Petition are material to its determination:

1. After respondents perfected an appeal to the United States Court of Appeals for the Third Circuit from the orders of petitioner entered earlier that day, respondents also petitioned for a writ of mandamus and/or prohibition to bar enforcement of the "gag" order.

2. On August 8, 1974, when the Court of Appeals issued its *en banc* Opinion and Order in the appeal, reversing and remanding, which is the subject of the instant petition, that court denied the petition for mandamus and/or prohibition as moot.

3. On June 1, 1973, respondent Frederick Schiavo was indicted on charges of committing perjury before a Grand Jury investigating the events surrounding the bombing death of Martin Allan Hess, a government informer in a celebrated and bizarre drug smuggling case. On June 15, 1973, when Schiavo and four others were indicted on charges of conspiracy to obstruct the administration of justice by murdering the government's witness, Hess, the United States Attorney issued a press release announcing the return of this conspiracy indictment, noting specifically that Schiavo had previously been indicted by a Camden County Grand Jury on charges of murder and conspiracy, and by the federal Grand Jury on charges of perjury (Joint Appendix, hereinafter referred to as "J. A.", p. 115). Thus, the newspapers in reporting on the Schiavo perjury trial did no more than the U. S. Attorney had done in reporting the indictments to the press and public.

4. On October 5, 1974, Judge Ditter called the news media representatives before him without prior notice and orally ordered them, on pain of contempt, not to publish matters about the criminal defendant Schiavo which "were not said here in the courtroom" (J. A. p. 49). When counsel for these respondents appeared that same afternoon to ask that the oral order be vacated, the precise conduct which had been enjoined by the oral order was unclear.[1] The only written order entered was an order denying the motion to vacate the prior oral order, and denying a stay pending appeal (J. A. p. 63).

5. On May 14, 1974, after defendant Schiavo had been found guilty, petitioner issued an Opinion and Order denying defendant's Motion for a New Trial and judgment of acquittal. At page 4 of his Opinion, petitioner stated as follows:

> "In further support of his motion for a new trial, Schiavo contends I committed error in refusing to grant a continuance or, in the alternative, a mistrial because of the prejudicial publicity that occurred before and during the trial. Being aware of the publicity that appeared in connection with the Martin Hess murder,

1. For example, did the order permit publication of events that transpired in the courtroom only on the day in question, or did it permit publication of anything that had transpired from the commencement of the trial? Did the order preclude publication of matters that transpired in open court but out of the presence of the jury? Could reference be made to side bar conferences or rulings on evidence? Could any background facts be given, such as the length of service or background of the presiding judge, the possible penalties for the offenses charged, the racial or other make-up of the jury, which might not have been mentioned in open court? Did the order prevent publication of a picture of the defendant in connection with a report on the events at the trial? Many more such questions concerning the nature and scope of the order can be imagined, and its ambiguities were compounded by the fact that neither respondents nor their counsel were afforded an opportunity to review a transcript of the Order before being bound by its terms.

> I conducted an extensive voir dire of the entire panel to find if any venireman recalled the event. In addition, I instructed the jury at the close of each day's session not to listen to, read about, or participate in any discussion concerning this case. Each morning I questioned each juror individually as to whether my instructions had been obeyed. In every instance the response showed my admonitions had been followed. Although better cooperation by certain members of the press during the trial would have been desirable, there is absolutely no indication that any member of the jury was aware of news stories concerning either the trial or related matters. . . . Thus, defendant's argument is without merit." (citations omitted).

On November 19, 1974, Schiavo's conviction was affirmed by the Court below.

ARGUMENT.

I. This Court Lacks Jurisdiction to Entertain the Instant Petition.

Petitioner has invoked the jurisdiction of this Court under 28 U. S. C. § 1254(1), which provides for review of cases in the courts of appeals by the Supreme Court:

> "By writ of certiorari granted upon the petition of *any party to any civil or criminal case,* before or after rendition of judgment or decree;" (emphasis added).

Here, the only judgment or decree rendered by the Court of Appeals was in respondents' appeal, in which petitioner was not even a nominal party. Although petitioner was named as a nominal party in the mandamus proceeding (pursuant to procedures previously established by the Court of Appeals in *Rapp v. Van Dusen,* 350 F. 2d 806 (3d Cir. 1965)), the Court below in its *en banc* opinion of August 8, 1974, ruled that: "Because our disposition of the appeal . . . renders the petition for a writ of mandamus and/or prohibition moot, such petition will be denied . . . ." (Slip Op. p. 3, n. 1). Thus, the only proceeding to which petitioner was even nominally a party was determined in his favor.

Because Judge Ditter was not a "party" to the Opinion and Order from which he seeks review, he has no standing to file the instant petition. See, *UAW, Local 283 v. Scofield,* 382 U. S. 205, 86 S. Ct. 373, 15 L. Ed. 2d 272 (1965).

II. It Is Inappropriate for This Court to Consider a Petition Filed by a Federal District Court Judge.

In *Rapp v. Van Dusen*, 350 F. 2d 806 (3d Cir. 1965), it was held that where mandamus is used to secure an interlocutory review of the intrinsic merits of a judicial act, the respondent judge will be deemed a "nominal party only." 350 F. 2d at 812-813. The reasoning behind such procedure was succinctly stated as follows:

> "It will keep him [the district judge] from becoming entangled as an active party to litigation in which his role is judicial and in which he has no personal interest. It will make it unnecessary for a judge to retain counsel and thus will avoid burdening him with the undesirable alternatives of acting as his own counsel, or seeking outside counsel to serve him with or without charge, or obtaining the services of counsel for the successful parties who continue to serve their clients by acting as his nominal counsel. A judge will thus be guarded from engaging in *ex parte* discussions with counsel or aligning himself even temporarily with one side in pending litigation." 350 F. 2d at 813.[2]

This Court had earlier recognized that mandamus has "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him." *Ex parte Fahey*, 332

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2. The Court further reasoned:

> "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel." 350 F. 2d at 812.

U. S. 258, 260, 67 S. Ct. 1558, 1559, 91 L. Ed. 2041, 2043 (1947).

These same considerations are present in the instant case. Here, the petitioning judge has retained his own private counsel. Neither the United States Attorney's office nor counsel for the defendant have sought review in this Court, and both of those parties are here named as respondents. To preserve the integrity of the judicial process, it is essential that the procedures established in *Rapp* be strictly complied with. The trial judges of the Third Circuit have since 1965 been, and petitioner is, bound by the procedures and prohibitions set forth in *Rapp*, and accordingly should not be permitted to become an active participant in this litigation, particularly in these circumstances.

III. The Decision Below Did Not Reach the Important Questions of Federal Law on the Merits of the Silence Order. It Merely Required the Trial Court to Adhere to the Accepted and Usual Course of Judicial Proceedings.

The decision of the Court below did not reach the fundamental fair trial-free press issues raised by the trial court's order. Rather, the opinion merely held that where a silence order is to be imposed against non-parties, the order must be in writing and entered on the docket after notice and hearing.[3]

It is difficult to comprehend petitioner's characterization of such procedures as "unworkably abstract" and "rigidly formal" (Petition, p. 9). They simply incorporate the traditional procedural safeguards of notice, hearing and specificity of restraint. They thus assure that the funda-

3. Compare, *United States v. Columbia Broadcasting System*, 497 F. 2d 102 (5th Cir. 1974), invalidating oral orders barring in-court and out-of-court sketching in the "Gainesville Eight" trial.

mental tenets of due process of law will be satisfied in the most sensitive area of restraints on speech and press, and, assuming arguendo that such a restraint can *ever* be justified in the context of a criminal trial, that such an order will be reduced to writing with such specificity as is required for any injunctive order, and entered on the docket as required in every civil or criminal proceeding.[4]

It was perfectly proper for the Court below to establish such procedural rules in the exercise of its fundamental supervisory power. The "[j]udicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States,* 318 U. S. 332, 340, 63 S. Ct. 608, 87 L. Ed. 819, 824 (1942). The broad powers of the federal appellate courts to supervise the administration of criminal justice in the trial courts have been recognized by this Court, see, *e.g., Bartone v. United States,* 375 U. S. 52, 84 S. Ct. 21, 11 L. Ed. 2d 11 (1963), and effectively and beneficially utilized by the Third Circuit Court of Appeals. See *Government of Virgin Islands v. Bodle,* 427 F. 2d 532 (3d Cir. 1970); *cf. United States v. Barber,* 442 F. 2d 517, 528 (3d Cir. 1971); *United States v. Fioravanti,* 412 F. 2d 407, 420 (3d Cir. 1969).[5]

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4. Federal Rules of Civil Procedure 65(d), 79(a); Federal Rules of Criminal Procedure 55.

5. See also *United States v. Columbia Broadcasting System,* 497 F. 2d 107, 109-110 (5th Cir. 1974), where the Court of Appeals, under its "supervisory powers", disallowed the practice of having the district judge himself try for contempt alleged violators of his own oral and unrecorded orders—eventually held to be invalid—banning publication of courtroom sketches.

IV. The Procedural Guidelines Properly Established by the Court Below in the Exercise of Its Supervisory Powers Are in Any Event Mandated by the First Amendment to the Constitution of the United States.

The silence order orally entered by the district court constituted a classic prior restraint on freedom of the press. *New York Times Co. v. United States*, 403 U. S. 713 (1971); *Near v. Minnesota*, 283 U. S. 697 (1931). Petitioner contends that it was not necessary to publish background information on the defendant because such information had already been published previously. However, as this Court has recently declared, the determination of what is "newsworthy" or "important" must be left to the press, not to judges or legislators. *The Miami Herald Publishing Co. v. Tornillo*, — U. S. —, 94 S. Ct. —, 41 L. Ed. 2d 730 (1974).

In any event, as Judge Adams' concurring opinion convincingly demonstrates, the minimal procedural safeguards required by the plurality are mandated by First Amendment considerations. In light of the heavy burden imposed on the party seeking to restrict First Amendment freedoms, *New York Times Co. v. United States, supra*, a hearing on a proposed silence order is essential, and any such order entered must be narrowly and specifically drawn. *Thornhill v. Alabama*, 310 U. S. 88 (1940).

Even in the area of obscenity, which has been excepted from First Amendment protection,[6] this Court has formulated required procedures before materials possibly protected by the First Amendment may be suppressed.[7] *A fortiorari*, the Constitution requires at least equivalent procedural protection when the speech sought to be suppressed

6. *Roth v. United States*, 354 U. S. 476 (1957).

7. *Freedman v. Maryland*, 380 U. S. 51 (1965); *Kingsley Books, Inc. v. Brown*, 254 U. S. 436 (1957). See also, *Grove Press, Inc. v. City of Phila.*, 418 F. 2d 82 (3d Cir. 1969).

is, as here, clearly within the ambit of central First Amendment concern. *Carroll v. President and Commissioners of Princess Anne,* 393 U. S. 175 (1968); *Monaghan,* First Amendment "Due Process", 83 Harv. L. Rev. 518, 519 (1970).

CONCLUSION.

For the reasons above set forth, this Court cannot consider and should not grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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